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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1971.

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MICHAEL RODAK, JR., CLERK

No. 71-1020

PHILADELPHIA CHEWING GUM CORPORATION,
Petitioner,

v.

SOMPORTEX LIMITED, BREWSTER LEEDS & CO., INC. and M. S. INTERNATIONAL, INC.,
Respondents.

BRIEF FOR RESPONDENT BREWSTER LEEDS & CO., INC. IN OPPOSITION.

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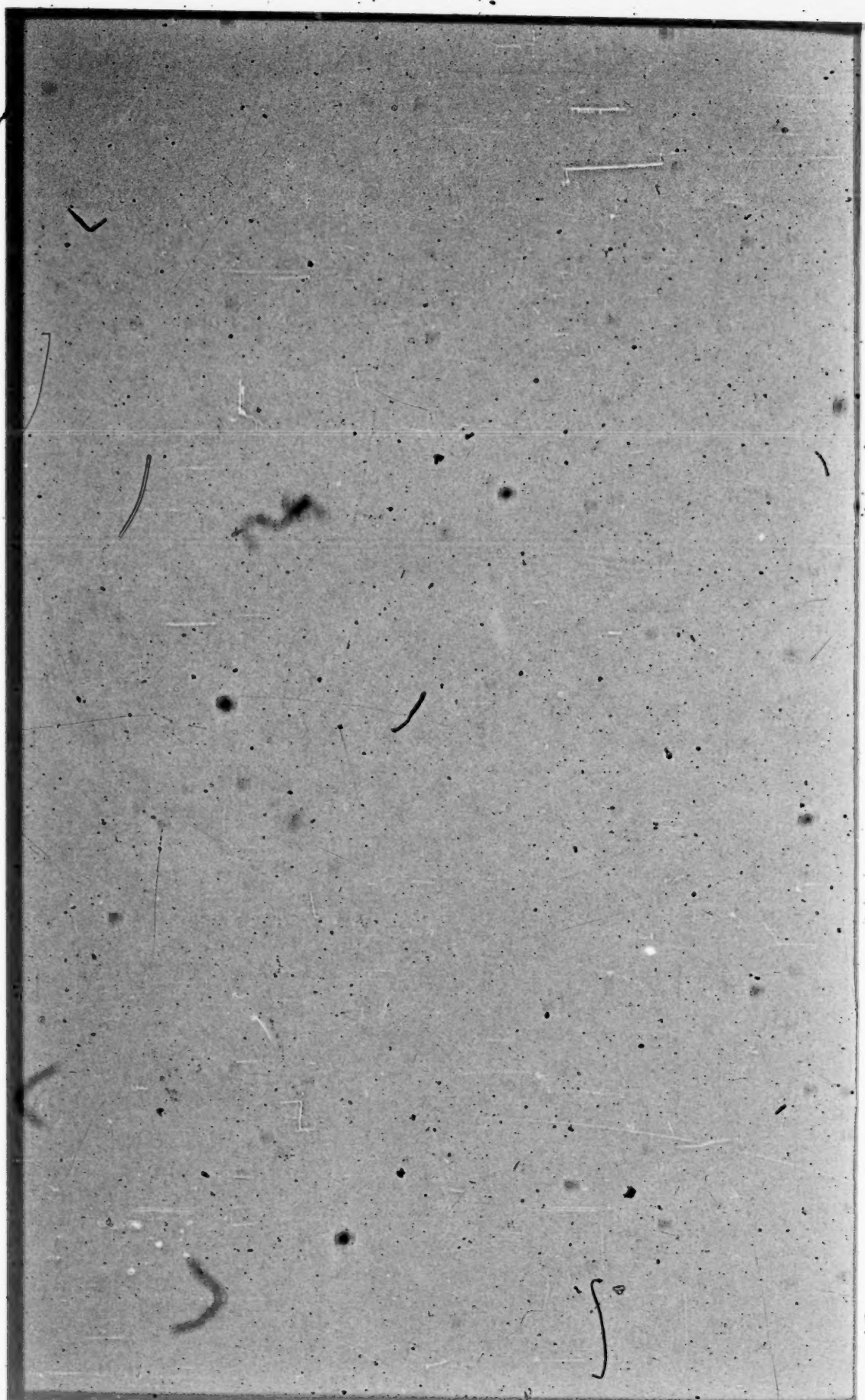

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OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported as *Somportex Limited v. Philadelphia Chewing Gum Corporation*, 318 F. Supp. 161 (E. D. Pa. 1970) and is printed in Appendix A to the Petition. The opinion of the United States Court of Appeals for the Third Circuit, which is not yet reported, is printed in Appendix B to the Petition.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on December 20, 1971. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether the District Court abused its discretion in refusing to allow a defendant in an action on a foreign judgment to implead in the action a third party who defendant claims is liable over to it for an alleged breach of duty which preceded the entry of the foreign judgment.

STATUTE INVOLVED.

Federal Rule of Civil Procedure 14(a) provides in pertinent part:

> "At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. . . . The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff

arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counter-claims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. . . ."

STATEMENT OF THE CASE.

Somportex Limited ("Somportex") brought an action in the United States District Court for the Eastern District of Pennsylvania to enforce a default judgment obtained by it against petitioner Philadelphia Chewing Gum Corporation ("Philadelphia") in the Queen's Bench Division of the English High Court of Justice ("English Court") (Rec. 5).[1] Jurisdiction was based on diversity of citizenship under 28 U. S. C. § 1332(a)(2) and (c).

In its answer, Philadelphia raised issues relating to the propriety of service of process, jurisdiction of the English Court, the validity of the judgment and whether it was entitled to recognition by the District Court. Philadelphia denied that the English Court had acquired jurisdiction over it or otherwise had power to enter the judgment and alleged that the judgment of the English Court could not be enforced as a matter of comity because of this lack of jurisdiction and for the additional reason that the judgment included elements of damage and costs not recoverable under the public policy of Pennsylvania.

Philadelphia filed a third party complaint against respondents Brewster Leeds & Co., Inc. ("Brewster") and M. S. International, Inc. ("M. S.") on the ground that they were liable over to Philadelphia for any liability of Philadelphia to Somportex under judgment of the English Court (Rec. 40). Brewster moved to dismiss the third party complaint as to it on the grounds (1) that it failed to state a claim against it and (2) that in the context of the present action, the use of third-party practice under Rule 14(a) was inappropriate (Rec. 57). The motion was granted by the District Court and the third party action was dismissed. The District Court also granted a similar motion by M. S.

1. All references to "Rec." are to petitioner-appellant's printed Appendix in the United States Court of Appeals for the Third Circuit, a certified copy of which has been filed with this Court.

Philadelphia's application to the District Court for a determination and direction, under Rule 54(b), that the orders dismissing the third party complaint be made immediately appealable was denied (Rec. 67).

Some 10 months later, the District Court granted Somportex' motion for summary judgment (Rec. 125), holding that the English judgment was validly obtained and enforceable. The Court entered judgment in favor of Somportex and against Philadelphia in the sum of $94,387.88, with interest (Rec. 141).

Philadelphia appealed to the United States Court of Appeals for the Third Circuit from the summary judgment entered against it and also from the previous interlocutory order of the District Court dismissing the third party actions against Brewster and M. S. The Court of Appeals affirmed the District Court in all respects, holding, with respect to the dismissal of the third party complaint:

> "We will quickly dispose of the third-party matter. We perceive our scope of review to be limited to an inquiry whether the district court abused its discretion in refusing impleader. At issue here was not the alleged contract to peddle Tarzan chewing gum in England. Had such been the case, Philadelphia's third-party arguments would have been persuasive. The complaints might have met the liability test and 'transaction or occurrence' requirement of F. R. C. P. 14(a). But the transaction at issue here is not the contract; it is the English judgment. And neither third-party defendant was involved in or notified of the proceedings in the English courts. Accordingly, we find no abuse of discretion in the district court's dismissal of the third-party complaints." (Appendix A to Petition, A23—footnotes omitted.)

ARGUMENT.

The District Court exercised its discretion under Rule 14(a) in refusing to allow Philadelphia to implead Brewster as a third-party defendant. The Court of Appeals, recognizing the District Court's discretion in such matters, found no abuse of that discretion and affirmed the action of the District Court. The determination by the Court of Appeals that there was no abuse of discretion in the District Court's dismissal of the third-party complaint was clearly correct, and we submit that this determination presents no question which warrants review by this Court.

The Complaint Was Based Solely on the English Judgment and Does Not Allege Any Independent Underlying Cause of Action.

Rule 14(a) of the Federal Rules of Civil Procedure requires that the third-party defendant be liable to the defendant for all or part of the plaintiff's claim against the defendant. "Impleader is not permissible unless these conditions are complied with; it is not a device for bringing into action any controversy which may happen to have some relationship with it." 3 Moore, Federal Practice ¶ 1404 at 502. See *Non-Ferrous Metals, Inc. v. Saramar Aluminum Company*, 25 F. R. D. 102, 104 (N. D. Ohio 1960).

As stated by Professor Moore,

> "[A] defendant cannot assert an entirely separate claim against a third party under Rule 14, even though it arises out of the same general set of facts as the main claim; there must be an attempt to pass on to the third party all or part of the liability asserted against the defendant." 3 Moore, Federal Practice ¶ 1407 at 512.

Somportex' claim was predicated solely upon the judgment which it obtained by default in England.[2] It did not allege any underlying breach of contract claim, and did not seek, in the alternative, a judgment on its underlying claim in the event the foreign judgment was determined to be defective. Thus, if Somportex was not entitled to obtain a judgment based upon the foreign judgment, its complaint would have been subject to dismissal.

In the present action, Somportex' claim was premised solely on the default judgment which it obtained in England, and the underlying merits of that judgment were not relevant except as they affected the jurisdiction of the English Court. Thus, except to the extent that the merits may have had bearing upon the question of jurisdiction, they were not relevant, and, indeed, Brewster would not, and could not, have litigated any issues with respect thereto. See *Schutter Candy Company v. Stein Bros. Paper Box Company*, 371 F. 2d 340, 342 (7th Cir. 1966).

Furthermore, it is clear that for a prior judgment to serve as a basis for indemnification in a subsequent suit, the person claiming a right to indemnification must both give adequate notice of the action and request that the indemnitor step in and defend the action. *Crawford v. Popé and Talbot, Inc.*, 206 F. 2d 784 (E. D. Pa. 1953). See also RESTATEMENTS, JUDGMENTS § 107 and particularly comment (e) thereof. The third-party defendant must be permitted to take part in the trial and to conduct examination and cross-examination of the plaintiff on the merits. *Wiggins v. City of Philadelphia*, 331 F. 2d 521, 529 (3rd Cir. 1964); *Hagans v. Ellerman & Buckuall Steamship Company, Ltd.*, 318 F. 2d 563 (3rd Cir. 1963).

Here, the Court of Appeals properly found that "neither third-party defendant was involved in or notified

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2. Paragraph 2 of the complaint states, "Plaintiff's claim is based upon a default judgment entered against defendant in * * * England."

of the proceedings in the English courts," a finding clearly consistent with the record below. Since Brewster would not be liable to Philadelphia for liability arising out of the default judgment, the judgment could not be used as the basis for a third-party claim against Brewster.

The Third-Party Complaint Fails to State a Proper Claim for Indemnity Against Brewster Under Rule 14(a).

As noted above, Rule 14 of the Federal Rules of Civil Procedure requires that the third-party defendant be liable to the defendant for all or part of the plaintiff's claims against the defendant. Here, Philadelphia only claims that Brewster is liable to Somportex. In paragraph 3 of its third-party complaint, Philadelphia alleged that Brewster has "* * * acted solely as a principal in negotiations with plaintiff * * *." Philadelphia thus charged that Brewster is directly liable to plaintiff Somportex. Accordingly, Philadelphia failed to state a proper claim against Brewster under Rule 14.

The District Court Did Not Abuse Its Discretion.

Even assuming that the third-party complaint was one which the District Court might have allowed under Rule 14(a), the District Court did not abuse its discretion in refusing to permit impleader in this action. As pointed out by the Court of Appeals, a Court, "called upon to exercise its discretion as to impleader, must balance the desire to avoid circuity of actions and to obtain consistent results against any prejudice that the plaintiff might suffer from complications of the case."

As the Court of Appeals properly perceived, the real issue before the District Court was the validity and enforceability of the foreign judgment rather than the merits of the underlying cause of action. The issue was not Somportex' right to recovery on the merits, but rather

whether the District Court should enforce the foreign judgment based upon principles of comity. The District Court obviously concluded, and the Court of Appeals found no abuse of discretion in the determination, that it would only unnecessarily complicate the proceeding to allow the defendant to implead parties against whom the defendant asserted rights arising out of the business relationships preceding the entry of the foreign judgment. Subsequent proceedings in the case have confirmed the wisdom of the District Court.

The original parties litigated in the District Court for another ten months over the events leading to the jurisdiction of the English court and the enforceability of the judgment, attempting to resolve numerous issues raised by the complaint and answer. The presence of Brewster Leeds and M. S. would have served no purpose except to have complicated the proceedings in the District Court.

The refusal to permit impleader did not result in the impairment of any right to indemnification which may exist. The effect of the District Court's ruling was merely to defer for possible independent action any claims which the defendant may assert over against the third-party defendants in the event the foreign judgment is sustained. It was the judgment of the District Court that such claims should not be permitted to complicate an already complicated dispute between plaintiff and defendant regarding the enforceability of the foreign judgment. We submit that this determination by the District Court did not constitute an abuse of discretion, and it was on this basis on which the Court of Appeals properly affirmed.